# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 28

CS CONSTRUCTION, INC.

**Employer** 

and

Case 28-RC-080331

OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, LOCAL 394

#### Petitioner

## HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON THE CHALLENGED BALLOTS

#### I. INTRODUCTION

This report contains my findings and recommendations regarding challenges to four individual ballots, made by the Petitioner, Operative Plasterers' and Cement Masons'

International Association, Local 394 (Union). The evidence shows that the four individuals who cast the ballots are not dual-function employees and perform job duties which are distinguishable from the classification of employees contained in the stipulated election agreement.

Accordingly, I recommend that the challenges to these ballots be sustained, and that a Certification of Representative issue.

#### II. PROCEDURAL HISTORY

On May 4, 2012,<sup>1</sup> the Union filed a petition seeking to represent a unit comprised of all cement finishers and masons employed by CS Construction, Inc. (the Employer), within the

All dates refer to 2012, unless otherwise noted.

limits of Phoenix, Arizona. Thereafter, on May 29, the parties signed and the Regional Director approved the Stipulated Election Agreement for an election in the following unit:

Included: All full-time and regular part-time cement masons

and finishers employed by the Employer in the State

of Arizona.

Excluded: All other employees, clerical employees,

maintenance employees, foremen, general foremen, superintendents, managerial employees, guards, and

supervisors as defined in the Act.

Pursuant to the agreement, the election was scheduled for June 13. At the June 13 election, the Union challenged the ballots of Jeremy Hill (Hill), Carlos Moreno (Moreno), Carl Perkins (Perkins), and Craig Potts (Potts), alleging that they were not employees of the Employer because they were not hired through the exclusive hiring procedure that existed under the collective-bargaining agreement between the Union and the Employer. The Union further alleged that the four employees in question are laborers and do not share a community of interest with the petitioned-for-unit of cement masons and finishers.

The tally of ballots served upon the parties indicates the following results:

Approximate number of eligible voters	7
Number of void ballots	0
Number of votes cast for the Union	3
Number of votes cast against the Union	0
Number of valid votes counted	3
Number of challenged ballots	4
Number of valid votes counted plus challenged ballots	

On June 25, the Regional Director issued an Order Directing Hearing on Challenged Ballots and Notice of Hearing, ordering that a hearing be held before a Hearing Officer for the purpose of resolving the challenges. The Regional Director further ordered that the Hearing Officer prepare and serve upon the parties a report containing resolutions of witness credibility, findings of fact, and recommendations to the Board as to the disposition of the challenges.

Accordingly, I heard this matter on July 9 and July 10, in Phoenix, Arizona. All parties appeared at the hearing and were afforded a full opportunity to be heard on the issues, examine witnesses, introduce evidence, make oral arguments, and submit briefs. Based upon the record as a whole,<sup>2</sup> including my observation of the witness,<sup>3</sup> review of post-hearing briefs, and the arguments of counsel, I hereby make the following findings of fact, conclusions of law, and report as to the disposition of the challenges:

#### III. THE EMPLOYER'S OPERATIONS

The Employer is a construction contractor which specializes in the installation of concrete structures and roadway electrical and underground installations. The company employs approximately 77 employees and is made up of two separate divisions: Concrete Structures and Traffic Signal and Lighting. Michael Borden (Borden) is the President of the Employer and Gary Denton (Denton) is the Vice-president. The Union and the Employer have had a collective-bargaining relationship. The most recent collective bargaining was effective July 1, 2009 through June 30, 2012, and was limited to the three concrete masons and finishers employed in the Concrete Structures division. The terms and conditions contained in the collective-bargaining agreement (Agreement) were not applicable to the employees whose ballots have been challenged. In addition to the three cement masons and finishers covered by the Agreement, other employees in the Concrete Structures division are covered by collective-bargaining agreements with the Southwest Regional Council of Carpenters and the International Union of Operating Engineers, Local 428. Both collective-bargaining agreements are limited to

The hearing transcript is generally accurate, but I make the following correction to clarify the record: the transcript misspelled the last name of Rafael Polanco as "Bolanco."

My credibility resolutions are based upon a review of each witness' testimony, their demeanor, the plausibility of the testimony proffered, the consistencies or inconsistencies therein, along with the exhibits in the record.

employees of the Concrete Structures division. Following the announcement by the Employer that it was terminating the relationship with the Union at the expiration of the Agreement, the Union filed the petition to represent the employees ultimately included in the stipulated election agreement described above.

#### A. Concrete Structures Division

The Concrete Structures division specializes in the construction of concrete structures such as bridges, box culverts, retaining walls, building slabs, building foundations, decorative "hardscape," sidewalks, and "anything reasonably large and made out of concrete." (Tr. 133)

Zachary Teegarden (Teegarden) is the division manager of the Concrete Structures division, and the only management official from the Employer who testified at the hearing. Teegarden reports to Borden and Denton, and is responsible for overseeing division operations and employees within the division. Dennis Centor (Centor) is the division Operations Manager and reports directly to Teegarden. As Operations Manager, Centor is responsible for overseeing the employees in the Concrete Structures division, managing division projects, and overseeing the six supervisors who report to him. There are three concrete masons and finishers in the division: Omar Puebla (Puebla), Caesar Retaina (Retaina), and Rafael Polanco (Polanco). Neither the Union nor the Employer has challenged the ballots cast by these employees.

Puebla, Retaina, and Polanco are full-time cement masons and finishers who, prior to the expiration of the collective-bargaining agreement, were covered by its terms. All three earn the expired contract rate of \$22.84 per hour and prior to the expiration of the contract, received employer contributions of \$4.25 per hour worked to their retirement fund, \$4.00 to the Health and Welfare fund, and \$0.32 to the Apprenticeship fund. Puebla, Retaina, and Polanco are journeymen cement masons and finishers who, having completed an apprenticeship program, are

proficient in the cement mason and finishing trade. All three are trained and knowledgeable in setting cement forms less than 14 inches in height, setting the grade of the concrete, rodding or striking concrete to level it by using aluminum or wood tools. All three are also trained to utilize tools referred to as screeds to compact concrete to ensure proper setting and finishing. While not applicable on all jobs, they are trained in tamping or hard rodding concrete to push rocks toward the bottom of the concrete. They are knowledgeable about and regularly use, both manual and motorized bull float or trowel machines to finish concrete by smoothing it and bump cutters to remove imperfections from concrete. They are further trained in spotting and finishing hot spots identified in the concrete as well as how to cure the concrete. In completing their tasks, the employees in the Concrete Structures division use various manual and powered tools, including edgers and trowels. Their primary duties, and with very few exceptions, are limited to cement mason and finishing work. Their interaction with other employees and supervisors is limited to those employees and supervisors who work in the Concrete Structures division.

#### B. Traffic Signal and Lighting Division

The Traffic Signal and Lighting division specializes in the installation of traffic signals, traffic signal switches and cabinets, street lights, and large overhead signage on highways, including the installation of wiring. The Traffic Signal and Lighting division is also responsible for the installation of concrete foundations to support the traffic signal, poles, and signage it installs and for the installation of sidewalks and ramps when installed in conjunction with cabinets, signals, signs, or traffic poles.

The management hierarchy in the Traffic and Light division is similar to that as the Concrete Structures division, though the Division Manager position is currently vacant.

Consequently, the tasks normally performed by the Division Manager are currently performed by

Denton and Teegarden. Scott Martinmaas (Martinmaas) is the division's Operations Manager and is responsible for overseeing division projects and managing approximately 10 supervisors. Martinmaas is also responsible for overseeing the employees in his division.

Among the employees in the division are Hill, Moreno, Perkins, and Potts, the four employees whose ballots are in question.<sup>4</sup> All four employees perform a number of duties which revolve around the installation of traffic signal and light poles, signs, fixture, cabinets, and switch boxes. In carrying out their duties, all four employees utilize tools and perform tasks which are not limited to concrete masonry and finishing work. For example, the employees use backhoes and drills to dig areas where traffic signals, lighting fixtures, and wiring are to be installed. They utilize electrician's tools to lay conduit, lay fiber optic cables, run wires to and from fixtures, and connect fixtures to switch boxes and cabinets. Sledge hammers are used to break sidewalk panels under which wiring and fixtures are to be installed. Hill, Moreno, Perkins, and Potts also perform concrete work, including setting concrete forms and pouring and finishing concrete. However, because the concrete work directly relates to the traffic signal and lighting work performed, the scale of the work is limited. Consequently, employees do not use bull float machines, bump cutters, or troweling machines. Moreover, they are not required and lack the requisite knowledge to identify hot spots on large structures where concrete dries unevenly and to finish those areas.

#### IV. LEGAL STANDARD

It is well settled that the three-part test set forth in *Caesar's Tahoe*, 337 NLRB 1096 (2002), applies to the resolution of challenged ballots in cases involving stipulated units. Under the first prong of the test, if the objective intent of the parties is expressed in clear and

At hearing, the parties stipulated that unless otherwise noted, all evidence offered for any of the four employees whose eligibility is at issue would uniformly apply to them all.

unambiguous language in the unit stipulation, then the Board will enforce the agreement. If the language of the stipulation is ambiguous with respect to an employee's eligibility, then it is appropriate for the Board to examine extrinsic evidence to interpret the stipulation. If the intent of the stipulation cannot be determined, then the Board will decide the eligibility of the challenged voters using the traditional community of interest criteria. Id. at 1097. The party seeking to exclude an individual from voting has the burden of establishing that the individual is, in fact, ineligible to vote. *Golden Fan Inn*, 281 NLRB 226, 230 n. 24 (1986).

It is well established that a certifiable unit need only be an appropriate unit, not the most appropriate unit. *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950), enfd. 190 F.2d 576 (7th Cir. 1951). In fact, "[i]t is irrelevant that some other larger or smaller unit might also be appropriate or most appropriate." *Tallahassee Coca-Cola Bottling Co.*, 168 NLRB 1037, 1038 (1967), enfd. 409 F.2d 201 (5th Cir. 1969). The Board determines appropriateness by evaluating whether the employees have a sufficient community-of-interest. *Overnite Transportation Co.*, 322 NLRB 723, 724 (1996). This analysis involves weighing such factors as whether the employees have comparable or divergent duties, qualifications, compensation, hours, supervision, and conditions of employment. Id.

#### V. DISCUSSION AND ANALYSIS

It is undisputed that the Union filed a petition after the Employer provided notice that it would not renew its collective-bargaining relationship with the Union following the expiration of the Agreement on June 30. The parties thereafter entered into a Stipulated Election Agreement and proceeded to a Board election.

A review of the text of the Stipulated Election Agreement entered into by the parties fails to reveal the objective intent of the parties and the employees whom the parties intended to include. In determining whether a stipulated unit is ambiguous, the Board compares the express language of the stipulated unit with the disputed classification. *Bell Convalescent Hospital*, 337 NLRB 191 (2001) (citing *Viacom Cablevision*, 268 NLRB 633 (1984)). The Board will find a clear intent to include those classifications that match the express language, and find "a clear intent to exclude those classifications not matching the stipulated bargaining unit description." Id. at 191. The stipulated bargaining unit is ambiguous in so far as it is not possible to determine with certainty whether the parties intended to include the four employees whose ballots are in question based solely on the duties that they perform. Consequently, under the second prong set forth in *Caesar's Tahoe*, 337 NLRB at 1097, extrinsic evidence may be examined to determine the intent of the parties when they entered into the Stipulated Election Agreement.

The record evidence reveals that in entering into the Stipulation, the Union sought to include only those concrete masons and finishers in the Concrete Structures division whom it represented under the terms of its expiring Agreement. In fact, the record reveals that the Union was unaware of the work performed by employees in the Traffic Signal and Lighting division. The record further establishes that at the time the Employer entered into the Stipulation, it did not intend to include the four employees whose ballots are currently in question. The testimony of Teegarden, the individual who signed the Stipulation on behalf of the Employer, revealed that it was only after it entered into the stipulation and while the Employer was putting together the Excelsior list, that it determined that Hill, Moreno, Perkins, and Potts should be included in the bargaining unit. (Tr. 140-141) When questioned if Hill, Moreno, Perkins, Potts, and the three bargaining unit employees were the employees he believed qualified for the unit when the petition was filed, Teegarden provided the following response:

A I mean, the obvious ones were definitely the ones that I -- that were my concrete finishers from the -- that were dispatched from the union. There were several

employees on the traffic signal and lighting side that met -- per my understanding of what is required to be considered a part time regular finisher, I felt there were several guys that met the criteria. However, a fair number of those have also some supervisory type role. It was also my understanding that as a supervisor, you couldn't be eligible to participate in the vote. So basically, when we were asked to provide the list of employees that seemed to meet the standard of the petition, that's what we came up with because it was for the whole company, it wasn't just for -- it said for CS Construction, it didn't say for just my division. So we tried to make it inclusive of anybody that might have qualification. (Tr. 140-141)

Implicit in Teegarden's response is that the Employer's determination that Hill, Moreno, Perkins, and Potts were to be included in the bargaining unit was made after the parties entered into the Stipulated Election Agreement on May 29. Paragraph 6 of the Stipulated Election Agreement required that the Employer provide the Regional Director with an election eligibility list within seven days from the date the Stipulation is approved by the Regional Director. (Jt. Exh. 2) While the record is silent as to the precise date that the eligibility list was made and furnished to the Regional Director, there would be no logical reason for the Employer to provide a list of eligible voters to the Regional Director prior to an agreement of which employees should be included in the unit and thus be eligible to vote. The Employer's subsequent efforts to expand the bargaining unit with additional employees whose inclusion it did not contemplate when entering into the agreement are impermissible under the standards in set forth in *Caesar's Tahoe*.

Even assuming that the extrinsic evidence adduced at the hearing is insufficient to make a determination as to the intent of the parties, the employees in question do not share a community of interest with the three undisputed bargaining unit employees. While it is undisputed that the four employees whose ballots are in question perform some cement masonry and finishing work,

their primary job duties and working conditions, wages, and supervision are distinguishable from that of the three unit employees, such that their exclusion from the bargaining unit is warranted.

In evaluating community of interest determinations, a multitude of factors must be examined, including degree of functional integration, common supervision, nature of employee skills and functions, interchangeability and contact among employees, work situs, general working conditions, and fringe benefits. *Overnite Transportation Co.*, 322 NLRB at 724. The Board, however, has found that employees who share some, but not all, factors can be placed together. In *Berea Publishing Co.*, 140 NLRB 516 (1963), the Board found that employees in the publishers composing room and art production department should be combined in a single unit because: (1) both departments prepared copies for publication; (2) the copies prepared in the composing room were then utilized in the art production department; (3) employees shared similar skills; (4) employees shared the same working conditions and the same overall supervision. Similarly, in *Harrah's Illinois Corp.*, 319 NLRB 749 (1995), the Board held that a unit combining maintenance employees and heavy cleaning employees was appropriate, based on their common supervision and frequent job interaction.

In the instant case, Hill, Moreno, Potts, and Perkins work in a separate division from the three employees in the stipulated unit. Consequently, they report to different supervisors and perform different tasks, though their job duties can be said to be similar in so far as they include some masonry and finishing work. The four employees have never interacted with the bargaining unit employees evidenced by Hill's testimony that prior to testifying he had never heard of the three bargaining unit employees. This was further confirmed by the testimony of Polanco who testified that he had never worked with Hill, Moreno, Potts, or Perkins. Moreover, unlike the three bargaining unit employees, the four employees in question were not previously

represented by a labor organization. Consequently, their hourly wages differ from those of the three unit employees, and prior to the expiration of the Agreement between the Union and the Employer on June 30, their health and pension benefits differed significantly.<sup>5</sup>

The Employer correctly points out that Hill, Moreno, Perkins, and Potts all perform masonry and finishing work. However, the extent, complexity, purpose, and scale of their work differ significantly from the masonry work performed by the three bargaining unit employees. For example, the masonry work performed by Hill, Moreno, Perkins, and Potts revolves around the installation of traffic and lighting fixtures. They dig or drill areas where traffic fixtures, lighting, and wiring must be installed. They break existing concrete where installations must be made, using tools such as sledgehammers, and set concrete forms of all sizes. They also pour concrete and, where appropriate, finish concrete. Each are knowledgeable electricians, who in addition to laying, running, and installing wiring, connect signals and fixtures to switch boxes and cabinets to make them operational.<sup>6</sup> The testimony at hearing revealed that the the scale of the concrete finishing and masonry work is limited to small projects which are directly intertwined with the installation of traffic and lighting fixtures. For example, following the installation of a traffic pole or signal, a concrete pedestal is poured and finished to secure the fixture. Similarly, when a signal switch is installed, a concrete ramp may be installed on the side walk to make the switch accessible to someone in a wheel chair. While these tasks undoubtedly include masonry and finishing, the skills and tools needed to complete such tasks are more limited and require far less skill than those performed by the unit employees in the Concrete

The three employees in the bargaining unit each earn an hourly wage of \$22.84 per hour. Perkins earns \$20.00 per hour. Hill earns \$22.00 per hour, while Potts and Moreno each earn \$23.00 per hour.

Perkins and Hill are certified by the International Municipal Signal Association (IMSA). IMSA certification requires specialized training in connecting and operating traffic signal switches. While Moreno and Potts are not IMSA certified, they are both trained and knowledgeable in the installation of traffic and lighting switches and perform such tasks regularly. Not all municipalities require IMSA certification.

Structures division. Testimony from Polanco and Hill established that while the bargaining unit employees in the Concrete Structures division use power tools such as bull floats and bump cutters, the four employees in the Traffic Signal and Lighting division do not. The absence of the use of power tools is not only indicative of the limited scale of finishing work performed by the four employees, but also shows the limited skills of the four employees in finishing concrete. The lack of functional integration, common supervision, interchangeability, and the difference in skills and functions among the employees in question and those in the bargaining unit are such that Hill, Moreno, Perkins, and Potts cannot be said to share a sufficient community of interest with the bargaining unit employees to require their inclusion in the unit.

The Employer's argument that Hill, Moreno, Perkins, and Potts are dual-function employees who share similar skills and perform similar duties is unconvincing and unsupported by the record. As noted above, while the four employees do perform some limited finishing work, their work, wages, skills, and supervision significantly differ. A dual-function analysis is a variant of the community-of-interest test. *In Berea Publishing Co.*, 140 NLRB at 518-519, the Board made clear that dual-function employees who share a substantial community-of-interest with full-time employees in a bargaining unit are entitled to the same rights and privileges in the selection of the majority representative. See also *Oxford Chemicals*, 286 NLRB 187 (1987). The absence of community-of-interest between the four employees in question and the bargaining unit employees renders further inquiry into dual-function unnecessary as the former is a requisite of the latter.

#### RECOMMENDATION

Based on the foregoing and the entire record, I recommend that the challenges to the ballots of Hill, Moreno, Perkins, and Potts be sustained. Since the vote tally was three votes for

the Union, and zero votes against, I further recommend that a Certification of Representative issue.<sup>7</sup>

Dated at Phoenix, Arizona, this 7<sup>th</sup> day of August 2012.

#### /s/ Pablo A. Godov

Pablo A. Godoy Hearing Officer National Labor Relations Board Region 28 2600 North Central Avenue, Suite 1400 Phoenix, AZ 85004-3099

Telephone: (702) 388-6012 Facsimile: (702) 388-6248 E-Mail: Pablo.Godoy@nlrb.gov

Within fourteen (14) days of the date of issuance of this report, any party may file with the Board an original and seven (7) copies of exceptions to the report. Immediately upon the filing of such exceptions, the party filing the exceptions shall serve a copy thereof, together with a copy of any brief in support, on each of the other parties, and simultaneously submit to the Regional Director a statement of such service. If no exceptions are filed, the Board may adopt the recommendation of the Hearing Officer.

#### **CERTIFICATE OF SERVICE**

I hereby certify that the **Hearing Officer's Report and Recommendations on the Challenged Ballots**, was served via E-Gov, E-Filing, facsimile and regular mail, on this 7<sup>th</sup> day of August 2012, on the following:

#### Via E-Gov, E-Filing:

Lester A. Heltzer, Executive Secretary Office of the Executive Secretary National Labor Relations Board 1099 14<sup>th</sup> Avenue NW, Room 11602 Washington, DC 20570-0001

#### Via Facsimile and Regular Mail:

Brian S. Carroll, Attorney at Law Burdzinski & Partners, Inc. 320 Grove St PO Box 932 Pratt, KS 67124-3070 Fax: (866) 433-4070

CS Construction, Inc. 22023 N 20th Ave Phoenix, AZ 85027-2010 Fax: (623) 780-1270

Operative Plasterers' & Cement Masons' International Association, Local 394 1425 E McDowell Rd Phoenix, AZ 85006-2938

Fax: (602) 252-4278

### |s| Dawn M. Moore

Dawn M. Moore, Election Assistant National Labor Relations Board Region 28 - Las Vegas Resident Office 600 Las Vegas Boulevard South, Suite 400 Las Vegas, Nevada 89101-6637 Telephone: (702) 388-6417

E-Mail: dawn.moore@nlrb.gov